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No. 330

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In the Supreme Court of the United States

OCTOBER TERM, 1964

ERNEST L. ALLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. 9) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1964 (R. 276). The petition for a writ of certiorari was filed on July 23, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a tape recording of petitioner's conversation with an Internal Revenue agent was admissible

in evidence to corroborate the agent's testimony relating to a bribe, where the conversation was transmitted by equipment carried by the agent when he entered petitioner's office by consent.

STATEMENT

After a jury trial in the United States District Court for the District of New Hampshire, petitioner was convicted of giving, on May 27, 1963, a $500 bribe to an Internal Revenue agent, in violation of 18 U.S.C. 201(b)(3).[1] He was sentenced to imprisonment for two years (six months of which was to be served and the execution of the remainder suspended with probation commencing after the sentence served) and to pay a fine of $1500 (R. 273). The court of appeals affirmed (R. 275-276).

At trial the government offered, *inter alia*, the testimony of Internal Revenue Agent Ferguson as to the conversation and transaction with petitioner on May 27, 1963. To corroborate his testimony, a tape recording of the May 27 conversation was played for the jury (R. 180-181). The circumstances leading up to the taking of this recording are as follows:

On May 24, 1963, agent Ferguson commenced an audit of the income tax returns of petitioner, an optometrist, at the latter's office (R. 131). That afternoon, petitioner, ascertaining that the examination could not be completed that day, placed an envelope in front of the agent and stated, "Take this and finish

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[1] Petitioner was acquitted on charges alleging offers to bribe on May 24 and 25, 1963.

the examination today". When the agent protested that he could not, petitioner urged "Go ahead, take it. No one will know. You can say these are papers" (R. 136). The agent noticed the outline of money in the envelope and asked to be allowed to think it over (R. 136). Petitioner made arrangements for the agent to call him that night. (R. 136-137). The agent reported the attempted bribe to the Service (R. 137, 14-16).

On May 25, petitioner called agent Ferguson at home, said he understood that Ferguson had to satisfy superiors and added that "There will be some more papers that will interest you" (R. 139).

On May 27, Internal Revenue inspectors outfitted agent Ferguson with a "Fargo" radio device capable of transmitting to a tape recorder an accurate and authentic reproduction of a conversation (R. 19, 77, 119, 140). Agent Ferguson then called petitioner, who assured the agent that he would be alone in his office and would lock the door to make sure (R. 141). Before leaving for petitioner's office, agent Ferguson was instructed to refer to the envelope petitioner had offered him, ask what he had in mind, and reach a proposed or estimated tax deficiency. In the event petitioner did not acknowledge the envelope, the agent was instructed to continue his normal audit (R. 140-141).

When agent Ferguson entered petitioner's office, petitioner locked the door (R. 142-143). In the ensuing conversation, which was recorded, the two men discussed the sum of $500. Petitioner indicated that he had not listed some of his stock transactions on

his returns and did not want to get involved in a lengthy audit. The agent estimated a tax deficiency of $300 (R. 143). Petitioner then gave the agent $500 in five packets of ten dollar bills (R. 144, 25).

ARGUMENT

As the court below noted, the tape recording of petitioner's conversation with the agent was obtained under circumstances indistinguishable from those involved in *Lopez* v. *United States*, 373 U.S. 427. In that case this Court declined to hold that the offer of the bribe to a revenue agent was a constitutionally protected communication. It ruled that the taxpayer took the risk that the offer would be accurately reproduced in court whether by faultless memory or mechanical recording. 373 U.S. at 438-439. Petitioner does not attempt to distinguish *Lopez* and advances no reasons why that decision should not be followed. His contentions do not warrant review.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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